Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1570

WALTER MONROE SMITH,
Petitioner,

versus

COTTON BROTHERS BAKING CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

WALTER MONROE SMITH,
Petitioner,

versus

COTTON BROTHERS BAKING CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 9, 1980, bearing Docket No. 78-1267 in the Court of Appeals.

OPINIONS BELOW

On December 5, 1977, the United States District Court for the Western District of Louisiana, Alex-

andria Division, dismissed petitioner's complaint because of his failure to comply with that Court's order of March 10, 1977. A copy of the District Court's opinion and judgment of March 10, 1977 and ruling of December 5, 1977, along with the judgment of dismissal dated December 13, 1977 as appears in the official record in the United States District Court for the Western District of Louisiana, Alexandria Division, Civil Action No. 76-0355 is appended to this petition as Appendix "A". The opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court is reported at ____F.2d ____and bears Docket No. 78-1267 in the United States Court of Appeals for the Fifth Circuit, the opinion and judgment being entered on January 9, 1980. A copy of this opinion is also included in the appendix to this petition as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 9, 1980. This petition for a writ of certiorari is filed within ninety (90) days from that date. Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1) Whether the Courts below erred as a matter of law in dismissing petitioner's complaint under the Consumer Credit Protection Act for the termination of his

employment due to the single garnishment of his wages.

2) Whether the decision of the Fifth Circuit Court of Appeals in the instant case is in conflict with the decision of the Ninth Circuit Court of Appeals in *Stewart v. Travelers Corp.*, 503 F.2d 108 (Ninth Circuit, 1974), thereby creating a conflict between the Circuits which necessitates that this Honorable Court grant this petition for certiorari to resolve the conflict.

3) Did the failure of the Union to timely and properly process petitioner's grievance justify the Courts below dismissing all of petitioner's claims in this action, including his independent claim under the Consumer Protection Act, Title 15 U.S.C. Section 1674.

STATUTORY PROVISIONS INVOLVED

This is an action brought pursuant to the Labor Management Relations Act, Title 29 U.S.C. Section 185 and the Consumer Credit Protection Act, Title 15 U.S.C. Section 1674(a). Other pertinent statutory provisions are Title 15 U.S.C. Section 1676.

STATEMENT

Petitioner (plaintiff), Walter Monroe Smith, was employed by respondent, Cotton Bros. Baking Com-

pany, Inc., as an apprentice maintenance mechanic in November, 1975. His work location was respondent's bakery in Alexandria, Louisiana. On or about January 27, 1976, petitioner's wages were garnished by a creditor. Three days later, on or about January 30, 1976, plaintiff's employment was terminated. He avers that this was due to the single garnishment of his wages in direct contravention of the provisions of the Consumer Credit Protection Act, Title 15 U.S.C. Section 1674(a).

Petitioner was a union member and under the terms of the collective bargaining agreement, then in full force and effect between petitioner's union and respondent, respondent could not terminate petitioner without just cause. Garnishment was not listed in the contract as sufficient cause to terminate an employee.

The collective bargaining agreement also provided in Note 2 of the Classifications and Wage Rates for Fleet and Plant Maintenance Departments that: "When a vacancy occurs and the apprentice is not chosen in accordance with Paragraph 10, his employment will be at the option of the Company for six (6) months without being subject to the provisions of the Grievance Procedure".

Plaintiff was an apprentice, who was not chosen in accordance with Paragraph 10. He had not worked in his position for over six months. He was, therefore, not

subject to the provisions of the grievance procedure of the contract. Accordingly, plaintiff alleged in his complaint that his remedy was not under the grievance procedure, but pursuant to the provisions of Title 29 U.S.C. Section 185 of the Labor and Management Relations Act to enforce the job security clause of the collective bargaining agreement.

The trial court found in its opinion of March 10, 1977 that the above cited provision of the employment contract was in actual conflict with other portions of the agreement. One portion of the contract purported to allow the unilateral termination of plaintiff's employment and other portions guaranteed plaintiff, as a Union member, the security of procedures enjoyed by all other members of the Union, including the protection of the grievance procedure and job security clause.

Additionally, plaintiff averred in his complaint that his termination of employment was in violation of the scope and purposes of Title 15 U.S.C. Section 1674(a), the Consumer Credit Protection Act and its provisions proscribing termination for a single garnishment.

Respondent filed an answer to plaintiff's complaint and a motion for summary judgment in its favor.

The trial court in ruling on respondent's motion for summary judgment ordered that plaintiff's claims should be referred to the grievance procedure pro-

vided in the collective bargaining agreement existing between plaintiff's Union and respondent for determination by an arbitrator whether there was just cause for plaintiff's termination. This determination was to include a finding concerning the part, if any, the garnishment of plaintiff's wages played in his termination. The trial court gave plaintiff a period of fifteen (15) days to apply for relief under the collective bargaining agreement and further ordered that the proceedings be stayed for a period of ten (10) days following the end of the grievance procedure to allow the parties to make application for such further relief as may be appropriate.

A dispute arose as to whether plaintiff's grievance was processed within the delays allowed by the trial court's order. A hearing was held on November 21, 1977 subsequent to which the Court ordered plaintiff's complaint dismissed because of the union's lack of compliance with the March 10, 1977 order.

The evidence at the hearing shows clearly and undisputedly that subsequent to the court's order of March 10, 1977, petitioner, within the prescribed period set by the trial court, delivered to the Chief Union Shop Steward his grievance to be filed with the Company. The evidence further showed that a conflict arises between the testimony of the Chief Shop Steward and Company officials as to whether the Union timely filed plaintiff's grievance with the proper Company officials. The trial court found that the

Union's Steward who was entrusted with the duty to file the grievance failed to do so within the time limits established by the court order and consequently dismissed the entire complaint of plaintiff, including his claim under the Consumer Credit Protection Act.

Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals reviewed the record and found that the District Court's finding of non-compliance with its March 10th order was not clearly erroneous.

The Court of Appeals also found as a matter of law that there is no implied private civil remedy for a violation of Sub-Chapter II of the Consumer Credit Protection Act, Title 15 U.S.C. Section 1674(a). In doing so, it disagreed with the reasoning set forth by the Ninth Circuit in *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir., 1974) wherein it was concluded that a private civil remedy was implied in Section 1674(a).

Petitioner has accordingly filed the present petition for writ of certiorari, seeking to have the judgments of the lower courts reversed and ordering that this matter be remanded to the trial court for a trial upon its merits.

REASONS FOR GRANTING WRIT

Petitioner contends that the Courts below erred as a matter of law in dismissing his complaint filed under

the provisions of the Consumer Credit Protection Act (CCPA) for the termination of his employment due to the single garnishment of his wages.

It is petitioner's position that he has a private civil remedy under Sub-Chapter II of the Consumer Credit Protection Act that is independent of his action under the Union contract. Sub-Chapter II of the (CCPA), Title 15 U.S.C. Section 1674(a) provides:

> No employer may discharge an employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

It also provides that the Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter. Title 15 U.S.C. Section 1676.

There is no question that Sub-Chapter II provides no express private civil remedy. However, in the absence of a clear congressional intent to the contrary, "courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose". *Burke v. Compania Mexicana de Aviacion*, SA, 433 F.2d 1031, 1033 (9th Cir., 1970) and cases cited therein.

This court has never directly addressed and answered the issue presented by this petition for certiorari.

The Ninth Circuit Court of Appeals in *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir., 1974) concluded that a private civil remedy is implied in Section 1674(a). That decision was followed by a District Court in the Tenth Circuit in *Maple v. Citizens National Bank and Trust Co.*, 437 F.Supp. 66 (WD Okla. 1977).

However, District Courts in Louisiana, Iowa, Kansas and West Virginia have ruled that no private right of action exists. See Footnote 3 of Fifth Circuit opinion, Appendix "B".

It is petitioner's position that he has a private cause of action against his employer for violation of the provisions of Section 1674(a). Though Congress did not specifically provide for a private cause of action based on a violation of this statute, it has not expressly excluded it either.

The provisions of the CCPA are remedial in nature and Section 1674(a) is designed to protect employment of wage earners. The provisions of CCPA should be liberally construed. Implication of private action is necessary to insure the full effect of the express congressional purpose behind the enactment of the CCPA. This was the view of the Ninth Circuit Court of Appeals in the *Stewart* case and was rejected by the Fifth Circuit in this case.

Moreover, implying a private right of action under this statute would do nothing more than provide "a

particular remedial mechanism normally available in federal courts". *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In *Stewart*, the Ninth Circuit found that the relief specifically provided in Sub-Chapter II was not exclusive and that a private cause of action should be implied in order to fully effectuate the statutory purpose of that legislation. The Court found that a private cause of action for dismissal due to a single garnishment of wages for one indebtedness was implicit in the CCPA. Whether or not a party has been discharged for a single garnishment was an issue of fact to be determined at the trial on the merits.

In the instant case, the Fifth Circuit held that private remedy was not implied under Sub-Chapter II of the CCPA. In doing so, it dismissed the reasoning of the Ninth Circuit as being modified by this court's opinion in *Cort v. Ash*, 422 U.S. 66 (1975).

It is respectfully submitted that the Fifth Circuit erred both in its conclusion that no private remedy was implied under Sub-Chapter II of the CCPA and that the reasoning of the Ninth Circuit was modified by this court's opinion in *Cort*.

In every case involving the determination of the implication of a private remedy, this court in *Cort* set out the criteria through which the legislative intent of

Congress could be discerned. See also *Davis v. Passman*, 99 Sup. Ct. 2264.

It is respectfully submitted that an application of the *Cort* factors clearly shows that a private remedy is implied under the provisions of CCPA.

First, there is no doubt that petitioner, an employee of respondent, is a member of the class of persons for whose benefit Sub-Chapter II was enacted. Protection of wage earners like petitioner was the obvious objective of the legislation.

The second inquiry is whether or not there is any indication of legislative intent, explicit or implicit, to create such a remedy or to deny one.

This Court made it quite clear in *Cort* that:

> ". . . in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." (emphasis in original — footnote omitted).

Accordingly there is no necessity for a plaintiff to establish an affirmative legislative intent that he be afforded a private right of action for the injury he has suffered in consequence of the violation of a federal statute.

The Ninth Circuit in *Stewart* found no clear Congressional intent contrary to the implication of a private civil remedy and that the express remedies provided therein did not insure the full effectiveness of the Congressional purpose underlying the statute.

The Fifth Circuit disagreed stating that the Congress had implicitly denied a private remedy under the statute. In doing so, the Fifth Circuit applied the doctrine of *expression unius est exclusio alterius.* It did so without actually saying it did. The Fifth Circuit stated that since Sub-Chapters I and III of the Act expressly provided for private civil remedies for non-compliance in addition to the primary administrative remedies, the implication of a private remedy in Sub-Chapter II was excluded by the Congress.

It is submitted that this rationale is too simplistic. The courts have often recognized that the purposes in drafting a statute are controlling in its interpretation rather than the application of convenient Latin formulae. See *City of Palo Alto v. City and County of San Francisco,* 548 F.2d 1374 (9th Cir., 1977). As now Circuit Judge Alvin Rubin of the Fifth Circuit Court of Appeals stated in *Fagot v. Flintkote Company,* 305 F.Supp. 407 (E.D. La. 1969):

> "It is an axiom of statutory interpretation that the purpose of a law furnishes the best guide to its application. It is no longer meet, . . . to attempt to construe a statute by the literal

> reading of its words, as if the statute were a tape measure to set beside a length of cloth. Statutes 'should be construed, not as theorums of Euclid, but with some imagination of the purposes which lie behind them.' ".

The implication question is whether Congressional intent to create or deny a remedy is best effectuated by judicial implication of a cause of action. The Ninth Circuit held that the provisions of Sub-Chapter II are best effectuated by the judicial implication of a private cause of action. The Fifth Circuit has disagreed with this holding. This case squarely presents to this court the conflicting interpretations of these two circuits for resolution.

The third inquiry mandated by the *Cort* decision is whether or not it is consistent with the underlying purpose of the legislative scheme to imply a private remedy for the plaintiff.

In *Cort* this Court stated that,

> . . . "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose,".

The primary purpose of Section 1674(a) is to protect individuals such as petitioner against the hardships and disruptions resulting from employee discharges due to but one garnishment of wages. As the Ninth Circuit

stated in *Stewart*, the administrative and criminal remedies for Section 1674 violations do not provide maximum protection and/or enforcement. The criminal provisions cover only *willful* violations. Enforcement by the Department of Labor is discretionary and not mandatory. The finding of an implicit private remedy would not be inconsistent with the legislative purpose of Sub-Chapter II.

The fourth inquiry mandated by *Cort* is whether or not the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law.

Obviously, Congress in enacting the CCPA determined that unrestricted state garnishments laws interrupted the free flow of commerce and thwart the uniformity of bankruptcy laws throughout the nation. It has constitutional power to regulate interstate commerce. Prohibiting an employer from discharging an employee whose wages have been garnished for only one indebtedness is a major protection afforded a debtor by this federal law.

Even the Fifth Circuit noted in its opinion that this factor was in favor of plaintiff's position of implying a private civil remedy.

In *Cannon v. University of Chicago*, 99 Sup.Ct. 560, this Court held notwithstanding the provisions of Title IX of the Educational Amendments of 1972 to expressly

authorize a private right of action, a woman who was denied admission to a federally funded medical school could maintain an action under that law.

It is respectfully submitted that this Court should grant this petition for certiorari and decide the question of whether there is an implied private right of action under Section 1674(a) of the Consumer Credit Protection Act.

Finally, plaintiff's claim under the Consumer Credit Protection Act is separate and distinct from any dispute arising under the collective bargaining agreement. It is petitioner's position that any failure to comply with the requirements of the collective bargaining agreement, either by him or the Union, should not prohibit him from asserting the independent statutory right accorded by Congress in enacting the Consumer Credit Protection Act.

The rationale of this position is supported by the case of *Alexander v. Gardner-Denver Company*, 415 U.S. 36, (1974) wherein this Court held that a Federal District Court considering an employee's claim under Title VII of the Civil Rights Act was not required to defer to the grievance process merely because an employee sought to vindicate his contractual rights under a collective bargaining agreement.

Succinctly stated whether or not plaintiff's grievance was timely and properly filed should not be deter-

minative of plaintiff's claim arising under the Consumer Credit Protection Act.

For the foregoing reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted and the judgments of the courts below should be reversed and that this matter should then be remanded to the District Court for trial on the merits.

Respectfully submitted,

BROUSSARD, BOLTON &
HALCOMB

DANIEL E. BROUSSARD, JR.
P.O. Box 1311
912 Fifth Street
Alexandria, Louisiana 71301

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of the above and foregoing Petition for a Writ of Certiorari have been furnished to the respondent by mailing same to its attorney of record, MR. ERNEST MALONE, Attorney for Respondent, P.O. Box 60118, New Orleans, Louisiana 70160, by placing three copies of same in the United States Mail, postage prepaid, this ____ day of April, 1980.

DANIEL E. BROUSSARD, JR.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

WALTER MONROE SMITH

versus CA No. 760355

COTTON BROTHERS BAKING COMPANY, INC.

NAUMAN S. SCOTT,
CHIEF UNITED STATES DISTRICT JUDGE

OPINION

This matter having come up for consideration on the motion for summary judgment based on the grounds that the union contract gave the employer the right to discharge the plaintiff without the formalities of the grievance procedure. We have examined the contract and the stipulated facts that the plaintiff was employed by the defendant as an apprentice (see Note 2 of the union contract) for a period of more than two months at the time of his discharge, and that he was, at that time, a member of the union. We find further that the provisions of Paragraph 3 of Note 2 of the union contract is in actual conflict with other portions of the contract in that one portion of the contract purports to allow the unilateral termination of plaintiff's employment and that other portions of the contract guarantee plaintiff, as a union member, the security of pro-

cedures enjoyed by all other members of the union, including the security of the grievance procedure. We find further that plaintiff's failure to apply for relief under the grievance procedures within the time limits specified in the contract was caused by the ambiguous and conflicting provisions in the contract regarding his right to grievance procedure and that in the usual course of events the collective bargaining agreement contemplates the use of the grievance procedure to protest a specific employer action and an employee may not sue for breach of contract on the basis of that action without first resorting to the procedure. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965) and its progeny. We find, therefore, that plaintiff should be referred to the grievance procedure provided in the contract for a determination of whether there was just cause, including a finding of whether garnishment was a cause, for his termination, and that he should have a specific period of time in which to make such application or this suit will be dismissed. This proceeding will be stayed until a period of ten days after the lapse of the time period allowed for plaintiff's application for grievance procedure (if plaintiff fails to make application) or the termination of the grievance procedure, whichever is longer. *Boone v. Armstrong Cork Co.*, 384 F.2d 285 (5th Cir. 1967). This proceeding may be reopened within said ten-day period if any issues remain for determination by this court.

Alexandria, Louisiana, this the 10th day of March, 1977.

/s/ NAUMAN S. SCOTT
NAUMAN S. SCOTT, Chief Judge
Western District of Louisiana

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

(Number and Title Omitted)

JUDGMENT

For written reasons previously found, it is:

ORDERED that plaintiff have a period of fifteen days to apply for relief under the agreement between Cotton Brothers Baking Company, Inc. and Local #370, Bakery & Confectionery Workers' International Union, effective for the period of July 14, 1974 thru July 10, 1976 to determine whether there was just cause for the termination of his employment and to determine further whether he was terminated because of garnishment, and it is

FURTHER ORDERED that this proceeding be stayed for a period of ten days beyond the fifteen-day

period allowed for plaintiff's application under the grievance procedure (if he fails to make such application) or a period of ten days following the termination of the grievance procedure, if such procedure is exercised. The parties may, during such ten-day period, make application for such further relief as may be appropriate.

Alexandria, Louisiana, this 10th day of March, 1977.

/s/ NAUMAN S. SCOTT
NAUMAN S. SCOTT, Chief Judge
Western District of Louisiana

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

(Number and Title Omitted)

NAUMAN S. SCOTT
CHIEF UNITED STATES DISTRICT JUDGE

RULING

This matter came on for hearing on November 21, 1977, and was taken under advisement by the court at that time. The purpose of the hearing was to determine if there had been a compliance with the court's

order of March 10, 1977. Specifically, whether the grievance of Walter Monroe Smith (plaintiff) had been processed within the delays afforded by the court's order.

Testimony was adduced at the hearing which displayed that the Union Shop Steward, Mr. Terrelle, was provided with the grievance from and instructed, as plaintiff's agent under the labor agreement in effect between defendant and its employees, to deliver it within the prescribed period. However, there was a dispute between testimony of the steward and company officials as to whether the grievance was in fact timely filed with the proper company official.

Having heard all the testimony, we conclude that the shop steward who was entrusted with the duty to file the grievance failed to do so within the time limits established by the court's order. Consequently, we hold that the complaint of Walter Monroe Smith must be dismissed because of lack of compliance with the March 10, 1977 order. This dismissal will in no way prejudice the plaintiff insofar as any action he may have against the Union for its failure to timely process his grievance. *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975); *Bohannon v. Reading Ship Co.*, 168 F.Supp. 662 (E.D. Pa. 1958). Defendant should submit a judgment consistent with this ruling within ten days of date hereof.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this the 5th day of December, 1977.

/s/ NAUMAN S. SCOTT
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

(Number and Title Omitted)

Filed: Dec. 14, 1977

JUDGMENT

This matter came for hearing before the Court on November 21, 1977, and in accordance with the opinion rendered by this Court on December 5, 1977, and for the reasons therein stated:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and hereby is entered for Defendant, Cotton Bros. Baking Co., Inc. and against Plaintiff, Walter Monroe Smith, as to all claims asserted by Plaintiff against Defendant in this cause.

Alexandria, Louisiana this 13th day of December, 1977.

/s/ NAUMAN S. SCOTT
CHIEF JUDGE, WESTERN
DISTRICT OF LOUISIANA

APPENDIX "B"

Walter Monroe SMITH,
Plaintiff-Appellant,

versus

COTTON BROTHERS BAKING CO., INC.,
Defendant-Appellee.

No. 78-1267.

United States Court of Appeals,
Fifth Circuit.

Jan. 9, 1980.

Appeal from the United States District Court for the Western District of Louisiana.

Before AINSWORTH, INGRAHAM and GARZA, Circuit Judges.

INGRAHAM, Circuit Judge:

This appeal arises from a dispute over the circumstances surrounding plaintiff's discharge from employment. The district court, sitting without a jury, held a hearing on November 21, 1977, and found that plaintiff had failed to comply with the court's order entered on March 10, 1977, and accordingly, dismissed plaintiff's complaint. From a take-nothing judgment in favor of the defendant, plaintiff perfected his appeal to this court. For the reasons hereinafter set out, we affirm.

Defendant Cotton Brothers Baking Co., Inc., was a party to a collective bargaining agreement with Local No. 370, Bakery and Confectionery Workers' International Union, AFL-CIO, which provided, *inter alia*, that employee union members could not be terminated without just cause. Plaintiff Walter Monroe Smith was employed by defendant as an apprentice maintenance mechanic in November 1975. At the time in question, he was a union member in good standing.

Sometime around January 1976, plaintiff's wages were garnished by one of his creditors. Subsequently, on January 31, 1976, plaintiff's employment was terminated. The reasons for his termination were disputed. Defendant claimed that plaintiff's job performance was unsatisfactory after repeated warnings; plaintiff claim-

ed that he was discharged because his wages had been garnished.

On April 1, 1976, plaintiff instituted this action in the district court seeking reinstatement to his former position, reimbursement for lost wages since the time of his discharge, attorney's fees and costs. Plaintiff's complaint included one cause of action for wrongful discharge in violation of the union contract, and a second cause of action for unlawful discharge in violation of Subchapter II of the Consumer Credit Protection Act (CCPA), 15 U.S.C. §1674(a).

During discovery, a question arose as to whether or not plaintiff was a probationary employee, and thus subject to discharge without the protection of the union grievance procedure. One portion of the union contract purported to allow unilateral termination of plaintiff's employment while other portions appeared to guarantee to plaintiff the security of procedures enjoyed by all union members, including the security of the grievance procedure. The district court found that since the collective bargaining agreement contemplates use of the grievance procedure, and there was an ambiguity in the agreement as to whether plaintiff, an apprentice, enjoyed the rights of other union members, then plaintiff should be referred to the grievance procedure before the court would rule on the merits of his claim.

On March 10, 1977, the district court entered an order staying its proceedings and granting plaintiff fifteen days in which to file his grievance with the union to determine whether there was just cause for the termination of his employment, and to determine whether he was terminated because of garnishment. The court granted an additional ten days thereafter, or ten days after completion of the grievance proceeding, whichever occurred first, in which to reapply to the court for any further relief.

Plaintiff completed the required written form and personally delivered the signed document to one Lonzo Lee Terrell, the shop steward, whose duty it was to file the grievance with the appropriate company official. It is undisputed that plaintiff timely gave the grievance to Terrell. The dispute centers around whether or not Terrell properly filed the grievance within the time limits set forth in the district court's March 10, 1977 order.

Sometime around July 11, 1977, plaintiff's counsel wrote and requested defendant's position regarding the handling of plaintiff's grievance. Defendant replied that since the grievance had not been given to Jimmy Burgin, the only official in the maintenance department authorized to accept grievances, until April 7, 1977 at the earliest, then it had been untimely filed and would not be processed. Nothing further occurred until November 11, 1977, when plaintiff again took the matter to the district court.

The district court held a hearing on November 21, 1977, in which several witnesses testified. Plaintiff's sole witness, Terrell, testified that he had attempted to serve the grievance on one Ralph Mingee, a company superintendent. He also testified that he attempted to serve the grievance on one James Paul, a high ranking employee in the maintenance department, who refused to accept it and told Terrell that the grievance had to be given to Jimmy Burgin. All of defendant's witnesses testified that March 26, 1977, was the earliest date that any alleged service attempt could have been made. Moreover, there was testimony that Terrell did not give the grievance to Jimmy Burgin until April 7, 1977. Defendant's witnesses also testified that each one had told Terrell that Burgin was the only person to whom the grievance could be given. There was also testimony that Burgin had been out of the office on April 7th, but had returned on April 8th.

At the conclusion of the hearing, and following oral arguments by counsel, the district court ruled that Terrell, who had been entrusted with the duty of filing the grievance, had failed to so file it within the fifteen day time limit set out by the court in its order. The court then dismissed plaintiff's entire complaint, including his second cause of action under the CCPA, for failure to comply with the March 10, 1977 order.

Plaintiff appeals to this court, arguing that the district court erred in two respects. First, plaintiff argues that the district court's finding of noncompliance with the March 10, 1977 order was clearly erroneous. Second, plaintiff argues that he has a private civil remedy

under Subchapter II of the CCPA that is independent of his action under the union contract, and the district court therefore erred in dismissing the entire complaint.[1]

Plaintiff's first argument is that the loss from any alleged company confusion that may have prevented the grievance from timely reaching the proper company official should not be visited on him. His contention is that he timely filed the grievance. It was the company's delay, in particular, the absence of Jimmy Burgin and the failure of the company to appoint an alternate official to receive grievances, that permitted the time limit to expire prior to the proper official being served with the grievance.

The testimony throughout the hearing was conflicting and many of the material dates and facts were disputed. Plaintiff argues that even if the actual service was untimely, the attempt to serve was not. Defendant disputed this contention and several of defendant's witnesses testified that to their knowledge no attempt to serve the grievance on a company official was made prior to April 7, 1977. Plaintiff is asking us to disregard all the testimony except that of Ter-

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1 The district court's order of March 10, 1977 was intended primarily to require plaintiff to resort to the grievance procedure. Arguably, the language could be read so that plaintiff's claim under Subchapter II of the CCPA may be barred merely because he did not comply with that order. However, we feel that the order should not be construed so broadly as to preclude consideration of plaintiff's Subchapter II claim. We will therefore decide that claim on its merits.

rell, his sole witness, who testified that he did attempt timely to serve the grievance on Ralph Mingee. The district judge had the opportunity to observe the demeanor and candor of the witnesses, and his decision as to the credibility and weight of the testimony must be affirmed absent clear error. We conclude that on the record as a whole the district court finding of noncompliance with its March 10, 1977 order was not clearly erroneous.

In arguing that the district court erred in dismissing his §1674(a) claim, plaintiff relies heavily on *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974), which concludes that a private civil remedy is implied in §1674(a). There is no question that Subchapter II provides no express private civil remedy.[2] However, plaintiff notes that "courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose," *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1033 (9th Cir. 1970), and he

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2 The relevant provisions are:

§1674. Restriction on discharge from employment by reason of garnishment

(a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

(b) Whoever willfully violates subsection (a) of this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§1676. Enforcement by Secretary of Labor

The Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter.

asks us to adopt the Ninth Circuit rule that an implied right of action exists.

Neither the Supreme Court nor the Fifth Circuit has spoken definitely on this issue; however, district courts from Louisiana, Iowa, Kansas and West Virginia have ruled that no private right of action exists.[3] Moreover, the language in *Stewart* must now be viewed as modified somewhat by *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). That case establishes several factors that are deemed relevant in determining whether a private remedy ought to be implied under a federal statute not expressly providing one. Those factors are 1) whether the plaintiff is a member of the class of persons for whose benefit the statute was enacted; 2) whether the legislature has implicitly or explicitly manifested any intent to create or deny such a remedy; 3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and 4) whether the cause of action is traditionally a creature of state law such that inferring a cause of action based solely on federal law would be inappropriate. *Id.* at 78, 95 S.Ct. 2080. *See Traylor v. Safeway Stores, Inc.*, 402 F.Supp. 871, 875 (N.D. Calif. 1975).

Although we believe that no single factor is necessarily more important than any other, a cursory

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3 *Western v. Hodgson*, 359 F.Supp. 194 (S.D. W.Va. 1973), *aff'd on other grounds*, 494 F.2d 379 (4th Cir. 1974); *Simpson v. Sperry Rand Corp.*, 350 F.Supp. 1057 (W.D. La. 1972), *vacated and remanded on other grounds*, 488 F.2d 450 (5th Cir. 1973) (per curiam); *Oldham v. Oldham*, 337 F.Supp. 1039 (N.D. Iowa 1972); *Higgins v. Wilkerson*, 63 Lab. Cas. ¶ 32,379 (D. Kan. 1970).

examination of the first three as they apply to the statute at issue leads us to conclude that no private remedy is implied under Subchapter II of the Act.

Congressional concern over the unrestricted garnishment of wages with the resultant disruption in production, employment and consumption brought about in large party by predatory extensions of credit led to the enactment of Subchapter II, CCPA, 15 U.S.C. §1671, et seq. With this legislation Congress also sought to remedy the disparities from state to state in the application of the bankruptcy laws due to the different restrictions on garnishment within each state *See* H.R. Rep. No. 1040, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin.News, p. 1962. The language of the Act itself provides that "[n]o employer may discharge any *employee* . . . ." 15 U.S.C. §1674(a) (emphasis added). It seems abundantly clear that plaintiff, an employee of defendant, is a member of the class of persons for whose benefit this subchapter was enacted.

Our inspection of the legislative history reveals no specific congressional intent to vest in discharged employees any federal right to damages for unlawful discharge under §1674(a). "True, in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Cort v. Ash, supra,* 422 U.S. at 82, 95 S.Ct. at 2090

(footnote omitted). An explicit purpose to deny a private cause of action does not appear in the legislative history; however, we take note of the statement of the Committee on Banking and Currency that "[e]nforcement of these provisions [in Subchapter I!] is vested in the Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor." H.R. Rep. No. 1040, *supra*, [1968] U.S.Code Cong. & Admin.News at 1978. Moreover, the statute expressly states that the "Secretary of Labor . . . shall enforce the provisions of this subchapter." 15 U.S.C. §1676. This would appear to be an implicit legislative manifestation to deny a private remedy.

The question of whether the implication of a private remedy is consistent with the underlying purposes of the legislature scheme is less apparent. Clearly, the purpose of the particular section under which plaintiff brought his action is to prevent employee discharge when that discharge is based solely on a garnishment for one single indebtedness. However, on that basis alone, we cannot say that a private remedy for such an unlawful discharge is implicit in the whole scheme. All three subchapters of the CCPA provide for primary enforcement[4] by administrative agencies. *Id.* §§1607, 1676, 1681s. However, only Subchapters I and III expressly provide for private civil remedies for non-com-

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4 It should be here noted that at no time during this proceeding has plaintiff ever contacted the Wage and Hour Division of the Department of Labor and requested administrative enforcement or assistance under Subchapter II. The machinery for vindication of his rights is there; plaintiff should not now be heard to complain.

pliance in addition to the primary administrative remedies. Moreover, those actions are limited in scope and application to their own respective subchapters. *See Oldham v. Oldham*, 337 F.Supp. 1039 (N.D. Iowa 1972).

Notwithstanding the overall purpose of the legislative scheme in the CCPA to provide greater debtor protections, we believe that judicially implying a private remedy under Subchapter II would disrupt the administrative procedure set out by Congress for vindication of those federally created rights.

The fourth factor noted in *Cort v. Ash, supra*, might appear to militate in favor of implying a private civil remedy. Although garnishment was traditionally a creature of state law, a cause of action based solely on the federal law restricting garnishment might not be inappropriate. However, on balance we feel that the other factors are of sufficient weight to convince this court that no private remedy should be implied. We leave it to Congress to provide the additional remedy under Subchapter II that it explicitly provided under Subchapters I and III. For us to undertake that task would be tantamount to judicial legislation, not statutory interpretation.

In conclusion we repeat that the district court finding of noncompliance with its March 10, 1977 order was not clearly erroneous and as such will not be disturbed on this appeal. We also find that there is no implied private civil remedy for a violation of Subchapter

II of the CCPA, 15 U.S.C. §1674(a). Since there is no implied private right of action, plaintiff has asserted no claim for which he may be granted relief; accordingly, the district court did not err when it dismissed plaintiff's entire complaint.[5] The judgment in all respects is correct and is

AFFIRMED.

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5 The district court specifically noted in its order, and we agree, that the dismissal does not prejudice plaintiff insofar as he may have any cause of action against his union for its failure to process timely his grievance. *See Ruzicka v. General Motors Corp.*, 523 F.2d 306, 310 (6th Cir. 1975).

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1570

WALTER MONROE SMITH,

Petitioner,

versus

COTTON BROS. BAKING CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent prays that the Writ of Certiorari sought to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 9, 1980, bearing docket No. 78-1267 in the Court of Appeals be denied.

OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix A), is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix B) is reported at 609 F.2d 738 (5th Cir. 1980).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ.

QUESTIONS PRESENTED

1. Whether the Fifth Circuit in applying the four-prong test of *Cort v. Ash*, 422 U.S. 66 (1975), properly found that no implied private right of action exists under Section 1674(a) of Subchapter II of the Consumer Credit Protection Act, 15 U.S.C. §1671, *et seq.*

2. Whether a substantial conflict exists between the Fifth Circuit's decision in the instant case and the Ninth Circuit's decision in *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974), which antedates this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), that would warrant the granting of the Petition for Writ.

STATUTORY PROVISIONS INVOLVED

The Petition for Writ deals with a question concerning the Consumer Credit Protection Act, 15 U.S.C. §1674(a). Other pertinent statutory provisions are 15 U.S.C. §§1640(a), 1676, 1681n, and 1681o.

STATEMENT

The facts of the case are stated fully in the decision of the Fifth Circuit Court of Appeals, (Petitioner's Appendix B, at pages 8a-12a).

REASONS FOR DENYING THE WRIT

Rule 19 of the Rules of the Supreme Court of the United States provides that, "[a] review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only [w]here there are special and important reasons therefor." Rule 19(b), further provides that a certiorari may be granted "[w]here a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this Court. . . ."

It is submitted that there is no substantial conflict between any courts of appeal with respect to whether there is an implied private cause of action under section 1674(a) of the Consumer Credit Protection Act. Further, there is no important question of federal law which has not been, but should be, settled by this Court, since this Court has within the past five years rendered three decisions stating how lower courts are to ascertain the existence *vel non* of implied remedies under federal statutes. See *Cannon v. University of Chicago*, ____ U.S. ____, 60 L.Ed.2d 560 (1979) (*Cort v. Ash, infra*, test applied to hold plaintiff had a private cause of ac-

tion under Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 et seq.); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) (*Cort v. Ash, infra*, test applied to hold plaintiff did not have an implied cause of action under section 14(e) of the Securities Exchange Commission Act, 15 U.S.C. §78n(e)); and *Cort v. Ash*, 422 U.S. 66 (1975). *Cf. Davis v. Passman*, ___U.S.___, 60 L.Ed.2d 846, 860 (1979) (*Cort v. Ash* test inappropriate for ascertaining the existence of private remedies under the Federal Constitution).

(1) The Fifth Circuit Applied The Four-Prong Test Set Forth In *CORT v. ASH* And Properly Found No Implied Private Cause Of Action Under 15 U.S.C. §1674(a).

In holding there is no implied private cause of action under 15 U.S.C. §1674(a), the Fifth Circuit properly applied the four-prong test of *Cort v. Ash, supra.*[1] More specifically, the Fifth Circuit found that Plaintiff was an employee of the Defendant who was a member of the class of persons for whose benefit subchapter II of the Consumer Credit Protection Act was enacted, and

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1 "First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . Second, is there any indication of legislative intent, explicit or implicit either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy. . . And finally, is the cause of the action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78.

therefore, Petitioner met the first prong of the *Cort v. Ash* test. See Petitioner's Appendix B at p. 15a; 609 F.2d at 742.

The Fifth Circuit next found that Congress implicitly indicated an intent to deny a private remedy under section 1674(a) of the Consumer Credit Protection Act. Particularly, the Fifth Circuit noted that the Committee on Banking and Currency stated that "[e]nforcement of these provisions [Subchapter II] is vested in the Secretary of Labor, acting through the wage and hour division of the Department of Labor." H.R. Rep. No. 1040, 90 Cong., 2d Sess., *reprinted in* [1968], U.S. Code Cong. & Admin. News, at 1978. Further, the Fifth Circuit took cognizance of the fact that section 1676 of the Consumer Protection Credit Act exclusively invested the Secretary of Labor with the power to enforce the provisions of subchapter II, in which section 1674(a) is located. The Fifth Circuit therefore found that Congress implicitly denied that there should be a private remedy for violations of section 1674(a). See Petitioner's Appendix B at 16a, 609 F.2d at 742.

In so holding the Fifth Court correctly applied the second prong of the *Cort v. Ash* test. The Court in *Cort v. Ash* held that where the existence of a private remedy was doubtful, then the absence of any suggestion in the legislative history or the statute was strong reinforcement for the conclusion that no implied private remedy existed. 422 U.S. at 82-83. Since the legislative history and 15 U.S.C. §1674 are utterly devoid of any indication that an implied private remedy exists, the Fifth

Circuit appropriately held that this indicated a Congressional intent to deny an implied private remedy.

The Fifth Circuit next found that the implication of a private remedy would be inconsistent with the underlying legislative scheme. The Court of Appeals noted that all three subchapters of the Consumer Credit Protection Act provided for primary enforcement by administrative agencies. 15 U.S.C. §§1607, 1676, and 1681s. However, the Fifth Circuit further observed that private remedies were only afforded by subchapters I and III. See 15 U.S.C. §1640(a), 1681n, and 1681o. Additionally, the Fifth Circuit found that actions pursuant to 15 U.S.C. §§1640(a), 1681n and 1681o were limited in scope and application to their own respective subchapters. See *Oldham v. Oldham*, 337 F.Supp. 1039 (N.D. Iowa 1972). On the other hand, since section 1674(a) is in subchapter II and it is unlike the other subchapters in that it does not specifically provide for private actions, the Fifth Circuit therefore correctly noted that implying a private remedy under section 1674(a) would be inconsistent with the underlying legislative scheme. See Petitioner's Appendix B at 16a-17a, 609 F.2d at 742.

Finally, applying the fourth factor of the *Cort v. Ash* test, the Fifth Circuit recognized that garnishment was traditionally a creature of state law, however, the Court nevertheless stated that an action such as the one Petitioner was proposing would not be inappropriate. The Fifth Circuit then concluded that despite the fact that the first and fourth factors of the

Cort v. Ash test militated in favor of Petitioner, the second and third factors strongly militated against implying a private remedy, and therefore, no remedy would be implied.

For reasons stated previously, this decision is eminently correct. It is consistent with the three Supreme Court decisions[2] instructing lower courts on how to ascertain the existence of implied remedies under federal statues. Consequently, there is no important question of federal law which has not been, but should be, settled by the Supreme Court.

(2) There Is No Substantial Conflict Between The Fifth Circuit Court Of Appeals Decision In The Instant Case And The Decision Of The Ninth Circuit Court Of Appeals In *STEWART v. TRAVELERS CORP.*, 503 F.2d 108 (9th Cir. 1974), Thereby Creating A Conflict Between The Circuits Which Necessitates That This Honorable Court Grant The Petition For Writ Since The Ninth Circuit's Decision Antedates This Court's Decision In *CORT v. ASH*.

Contrary to Petitioner's argument, there simply is no substantial conflict between the Fifth and Ninth Circuits on this issue warranting a grant of the Petition

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2 *Cannon v. University of Chicago, supra, Piper v. Chris-Craft Industries, Inc., supra; Cort v. Ash, supra.*

for Writ. The Ninth Circuit decision in *Stewart v. Travelers Corp., supra,* antedates this Court's decision in *Cort v. Ash, supra,* and consequently did not apply the four-prong test of *Cort v. Ash.* Both the Fifth Circuit in the present case and the district court in *Traylor v. Safeway Stores, Inc.,* 402 F.Supp. 871 (N.D. Calif. 1975), recognized that *Cort v. Ash, supra* had modified the decision in *Stewart v. Travelers Corp., supra,* and therefore, a true conflict does not in fact exist.

(3) The Fifth Circuit Considered The Merits Of Plaintiff's Independent Claim Under Subchapter II Of The Consumer Credit Protection Act, 15 U.S.C. §1674, And Properly Rejected It.

The Fifth Circuit did *not* hold that Petitioner's failure to timely process the grievance disposed of Petitioner's claim under the Consumer Credit Protection Act. See Petitioner's Appendix B, footnote 1 at 12a, 609 F.2d at 740-41. Rather, the Fifth Circuit expressly considered the merits of Petitioners substantive claim that an implied private cause of action existed in section 1674(a) of the Consumer Credit Protection Act and properly rejected it.

CONCLUSION

For the reasons set forth above, the Petition For Writ of Certiorari should be denied.

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CERTIFICATE

I hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition have been furnished to Petitioner by mailing the same with attorney of record, Mr. Daniel E. Broussard, Jr., Attorney for Petitioner, Post Office Box 1311, 912 Fifth Street, Alexandria, Louisiana 71301, by placing three copies of same in the United States mail, postage prepaid, this 30th day of May, 1980.

ERNEST R. MALONE, JR.